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KILLING ME SOFTLY

The Security Intelligence Service must be taken very much on trust. A blanket of security covers its operations. No-one knows much about what it does or how it does it; whether it bends the law or plays it straight. Its operations are secret and as Sir Guy Powles said in his report last year "secrecy breeds suspicion, and suspicion breeds fear".

Had it been desired to increase public distrust of the service then the events surrounding the introduction of the New Zealand Security Intelligence Service Amendment Bill could not have been better planned. Legislation to permit interception of communications is to be passed without select committee hearings, despite the expectation that groups such as the New Zealand Law Society would wish to comment. Submissions could be sent to the Prime Minister within a month. The Law Society has been critical of the inadequate time allowed in the past for consideration of legislation at the select committee stage. This new development was not met with enthusiasm but a request to reconsider was to no avail.

The end result is that legislation to authorise the operations of a service that should operate as an exception to a general policy of open government is itself proceeding in a manner which many see as being an exception to preferred parliamentary practice and contrary to their ideals of the manner in which a participatory democracy should operate. Hardly an inspiring start.

Response to criticism of the Bill was even less encouraging. The Prime Minister's objection to a television programme half way through the *first* speaker (Mr Michael Minogue MP) made one wonder whether the distinction made by Sir Guy between subversion and dissent had been appreciated.

No-one is happy about the imprecise specification of the proposed form of the Minister's report to Parliament. Generally, opinion favours the view that the number of interception warrants issued should be stated. It is not enough that "regard" be had to them. It may be that by the time this is published that provision will have been amended. In the meantime we are assured that a failure to state the number would give rise to the most severe criticism from Parliament – which roughly translated means secretly within caucus, or ineffectively in the House.

This response has a similar ring to that of the Minister of Labour, Mr Gordon, in respect of an article by Noel S Wood on the Industrial Relations Legislation ([1977] NZLJ 352). In effect he said that while certain procedures had not been precisely stated in the Act it would be unthinkable that those procedures would be misused in the way suggested. Maybe – but trust is no substitute for precision. We are being asked to rely too much on the man and the SIS Amendment Bill is a good place for adhesive toes.

There is a belief that the SIS has intercepted communications in the past. Perhaps illegality has its own discipline – fear of being apprehended, or impracticability of using the information gained. Sir Guy, quite properly, did not feel that the discipline of illegality was appropriate.

> "This is a proposition which I could not possibly accept or recommend Government to accept. It seems to me not to be consonant with the dignity or honour of a country which professes a British constitution and an adherence to the rule of law, that one of its important organs existing for the purpose of national defence might, because of legal

difficulties, be compelled to step outside the existing legal structure".

In its original form the amendment gave the authority without the discipline. There was no control on the use of incidentally obtained information. A later amendment to the Bill provides for destruction of that information. Originally the Bill prohibited publication of the names of SIS members – a provision that was seen as removing an important control on any tendency towards impropriety. That provision has been deleted.

These amendments and others have followed vigorously pursued objections to the proposed legislation. These objections have been pursued in defence of personal freedoms and in opposition to what was seen as a direct and to some extent uncompromising assault on those freedoms. The situation was one of confrontation. Hardly the best for ensuring the development of reasoned legislation on a delicate topic. Again the finger points to the lack of select committee hearings. The decision not to hold them has not helped the SIS. So much for Sir Guy's desire to see an improvement in the public standing of the service.

Finally, for those with a big brother complex, as well as for those who simply value their privacy, there is the provision that the communications interception provisions "shall have effect notwithstanding anything to the contrary in any other Act", ie the Wanganui Computer Centre Act 1976. Inland Revenue Department Act 1974 and the Statistics Act 1975, to name but three. One wonders how accurate the next census will be.

Tony Black

SECURITY INTELLIGENCE SERVICE AMENDMENT BILL

Submissions of the New Zealand Law Society.

1 The Society requested the Prime Minister to refer this matter to a Select Committee. The Prime Minister did not see fit to do so. The Society remains of the view that this Bill should have been referred to a Select Committee for detailed examination. Its exceptional provisions require the closest study.

2 In an ordinary context, the Society would regard the provisions of cl 4 of this Bill (interception warrants) as repugnant. While no general enactment yet exists defining the limits of the citizen's right to privacy, few would contend that deliberate interception or eavesdropping upon private communications is anything but an unacceptable invasion of individual rights.

3 The Society recognises, however, that there is room for the view that the end of "security" as defined in the Act is of such an exceptional nature that it may justify the means involved, namely interception warrants. Whether this view should prevail in the present context is essentially a matter for Parliament.

4 The concern of the Society is to see that, if in principle such interceptions are to be made lawful, they are kept within strict limits. In particular, it sees the necessity for:

(a) very tightly defining the circumstances in which such interceptions may be authorised so as to restrict interceptions to matters clearly relating to "security";

(b) a power of investigation by a satisfactory independent authority;

(c) provision restraining any use of information not related to security and incidentally acquired.

5 As a preliminary point, it should be noted that "interceptions" authorised under the Act are not restricted to "telephone tapping" and to mail opening. The definition of "intercept" included in cl 2 is wide enough to include the use of sophisticated listening devices popularly known as "bugs".

6 The circumstances in which an interception warrant may lawfully be issued, and the powers which it confers, have been defined with some care in cl 4. Nevertheless, there are unsatisfactory features.

(a) It is notable that in a field where Parliament is asked to approve virtually exclusive reliance upon the judgment in particular cases of the Director of Security and the Minister concerned, the powers to apply for and to issue warrants are

not necessarily restricted to the Director and Prime Minister themselves. The proposed new s 4A (1) permits application to be made by the Director or by a person authorised in writing in that behalf by the Director. The words appear wide enough to permit a general authorisation by the Director to some subordinate officer or officers of the Service. If the intention is merely to provide machinery for an application in the event of the Director being abroad or indisposed, the Act should be so expressed and should confine the power to the acting Director. Likewise, while this service has customarily been a portfolio of the Prime Minister himself, nowhere is this specifically required by the Act. Any assumption that the issue of warrants will be controlled at the level of the Prime Minister himself can come only from current practice, and not from the proposed legislation. If the issue of warrants is to be controlled by the Prime Minister himself, the Bill should say so.

(b) Section 4A (2) (d) provides that any interception warrant issued shall "contain such terms and conditions as the Minister considers advisable in the public interest". The Society assumes there is no intention to authorise criminal or unlawful activity. To avoid doubt, it is considered that the provisions should refer to "lawful terms and conditions".

(c) Clause 4A (4) should provide for reports to Parliament to "state" the number of warrants issued, not merely "to have regard" to that fact. Likewise, the exact length of time for each warrant should be stated. An average is meaningless. If, as the Society submits, an independent authority is appointed with investigative powers, the report to Parliament should include particulars of action taken by that independent authority, who should himself have the right to make a report to Parliament.

(d) (i) An outstanding feature of the proposals for interception warrants is the complete absence of any machinery to investigate possible abuses. First, the issue of the warrant is to lie exclusively within the judgment of the Security Service Officer and Minister concerned. Under the proposed new s 4A (5) (b) the issue of the warrant is not to be subject to judicial review in any fashion. The evident intention is that the issue of a warrant, even without jurisdiction, cannot be challenged in the Courts. Such provision is unusual. Second, it is possible, and indeed likely in the case of "telephone tapping", that the citizen affected will be unaware of the existence of the warrant and interceptions made. No steps to check possible abuses of power will be initiated. Third, if a citizen does suspect that he is under surveillance, and feels justifiably aggrieved, he will have no way to ascertain the true position and have steps taken to put matters right. The requirement for a report to Parliament under the proposed s 4A (4) (even with the changes suggested) is of such a generalised nature that it is not regarded as any real protection.

(ii) If for policy reasons provision for judicial review is unacceptable, the Society considers it to be essential that a satisfactory independent authority should be given a power and duty to investigate the issue and execution of interception warrants regularly of its own motion, and immediately on complaint by any citizen unless it considers the complaint frivolous or vexatious. If upon such investigation the authority ascertains that a warrant has been issued without jurisdiction, or irregularly, or that the terms of the authority given by the warrant are being exceeded, or that there are grounds for other reasonable complaint, the authority should first report the matter to the Prime Minister for corrective action with a right subsequently either to report directly to Parliament or himself to order cessation of the improper activity concerned, if corrective action is not taken. The proposal has some analogy with the role of the Privacy Commissioner in relation to the Wanganui Computer Centre, and with the role of the Ombudsman. The obvious official to hold the proposed role would be the Commissioner of Security Appeals already constituted under the Act, thus restricting the distribution of sensitive information, or otherwise the Ombudsman or a present or retired Supreme Court Judge.

(e) The new s 4A (5) protects from Court action a person intercepting or seizing, or taking "any reasonable action necessarily involved" in interception or seizure "In accordance with the terms and conditions of the warrant". A person carrying out an interception or seizure who takes action which is not "reasonable" or "necessarily involved" or who acts outside the "terms or conditions of the warrant" remains potentially liable in Court proceedings. This is some residual protection to a citizen, if he becomes aware of the irregular action concerned, and if he can obtain the necessary evidence. However, even if he overcomes those problems, the citizen concerned may well encounter difficulty in proving any actual damage arising from such activities. It is considered that provisions along the lines of s 28 (2) (c) of the Wanganui Computer Centre Act 1976 should be inserted, allowing for an award of damages to the citizen concerned for "embarrassment, loss of dignity, and injury to the feelings" subject to an appropriate limit. The limit in that Act is $500.

7 Particularly in the case of "telephone tapping" over a period, the Service is likely to come into possession of information not in any way related to "security" as defined in the Act, but of a damaging nature to the citizen concerned. The Service might learn for example that he was involved in some personal or business activities of

an undesirable nature, possibly even criminal. The only justification for exceptional interception powers is "security", and not the gathering of such other information. While such latter information remains strictly within the Service, probably no great harm will be done. The Society points however, to the power conferred upon the Minister under the proposed s 12A set forth in cl 6 of the Bill to authorise release. The Society sees no need for the Minister ever to authorise release of information unrelated to security, and obtained only incidentally, and suggests that power be deleted. Provision for destruction of the record of any information is also desirable. There is no possible jurisdiction for warrants issued in the interests of national security to confer benefits upon the Police or Inland Revenue Department.

8 The Society also draws attention to the fact that the clear recommendation of the Chief Ombudsman (p 30, para 16) limiting intelligence gathering in the case of mere "potential" subversives has not been adopted. The absence of this protection is questioned.

9 As a general matter, the Society is deeply concerned at the possibility that confidential communications between lawyers acting in their professional capacity and their clients may be the subject of interception or seizure under this Act. The right of the public to absolute confidentiality in their dealings with the legal profession is of long standing and is of fundamental importance. The Society will feel obliged to take a very strong view indeed of any use of the proposed powers in relation to communications to or from legal practitioners acting as such, particularly those concerned with the conduct of the defence of criminal charges.

LEGAL LITERATURE

The Matrimonial Property Act 1976 – by RL Fisher, Wellington. Butterworths of NZ Ltd, 1977, xxviii + 188pp $20. Reviewed by JB Robertson.

The publication by Mr Fisher of a concise handbook on this important new legislation will be welcomed by both students and practitioners. The undue haste with which Parliament finally introduced this legislation, because of the commitment by both major parties in their election manifestos, has led to enormous uncertainty in the profession and not insubstantial difficulties in providing competent and adequate advice to clients. When law reform is simply stimulated by pressure politics, the commentator who is prepared to seek some legal principle and rational pattern is brave indeed, but much to be commended.

In a stimulating and concise manner, this book has provided a provocative and thought provoking assessment of the words of the statute. As one might have anticipated from the nature of this legislation, a good deal of the comment to date has been based on certain preconceptions as to what it was thought that Parliament had intended. The history of the Matrimonial Property Act 1963 is clear evidence that the Courts will be unmoved by such considerations, and therefore the clear analysis by Mr Fisher based on already decided legal cases and established principle is extremely helpful.

In his preface, the author indicates that he has "attempted to find and explain the ideas which seem to underline the detailed wording of the Act". That he has achieved. The value of his analysis and the assistance to be derived from those places where he has suggested "workable solutions in areas of the Act which seem contradictory, obscure or discretionary", is even more valuable. All is predicated on a legal assessment of decided cases and principles which can be extracted from the previous determinations by the Courts in related fields.

The book is divided into numbered passages, which although a little disconcerting if one endeavours to read the work as a unified whole, are of enormous advantage if one seeks elucidation on a particular section of the Act. The extensive cross referencing in the book, and the Act annotated to these paragraphs will be a trusty flashlight for the intrepid who begin the search through this somewhat cavernous maze until decisions of binding authority become available. Every practitioner and student will find enormous advantage from this handbook and one may anticipate that the Bench will also find its simplicity of presentation of many of the internal conflicts and discrepancies of the Act, most appealing.

One only hopes, that when the Courts have grappled with the uncertainties of the Act for a period, and Parliament has provided the remainder of the necessary and corollary reforms in the area of domestic rights in property, Mr Fisher will provide "a comprehensive text on matrimonial property and income" based on the same approach which makes his interim handbook so valuable.

GOLDEN HANDSHAKE TO AN EXECUTIVE DIRECTOR

By G SHAPIRA, *Senior Lecturer in Law, University of Otago*

A most likely consequence of a take-over of a company would be the replacement of the existing management by the nominees of the new controller. When directors are considering a bid to acquire share control of their company they know that it may well cost them their jobs. At the same time, their support for the bid is vital. Statistics show that very few take-overs are likely to succeed if opposed to by the incumbent directors, while the majority of the successful ones have had their support *(a)*.

A fairly similar situation exists where the company's assets, rather than its shares, are being acquired. The decision to sell the enterprise is made by the directors. At the same time it would lead to the abolition of their positions.

The pivotal role of the directors in conjunction with the threat to their office raises an obvious consideration of compensation for loss of office. Such payments, popularly known as "golden handshakes", may take various forms. In an attempt to defeat an impending take-over or protect themselves against consequential dismissal, the directors may vote themselves long term services agreements, with or without hefty compensation clauses. A take-over bidder, on the other hand, may enhance his chances to earn the directors' good will and co-operation, if he offers them attractive retirement benefits. Directors who are also shareholders may be offered a higher price for their own shares than that which is offered to other shareholders, the excess being, in effect, compensation for loss of office.

The fiduciary relationship of directors towards their company obliges them to act in the best interest of the company and for the proper purpose of their powers. It invariably prohibits them from making personal profit from their position unless such profit is disclosed to the members and approved by the company in general meeting *(b)*. These general duties would apply in the situations described above. However, side-payments to directors in connection with a take-over involve some special issues. An offer for the acquisition of the shares is usually communicated to the shareholders by the directors *(c)* and is accompanied by their recommendation as to the adequacy of the price;

> "The directors may own sufficient shares to block complete success or to make it unlikely. The general body of shareholders will in any event look to their directors for guidance and will generally tend to follow a recommendation to accept or reject. Approval by the directors will ensure that there are no defensive tactics on the part of the company. It is therefore necessary for the law to ensure that the directors... do not divert to themselves a disproportionate part of the consideration paid by a bidder at the same time by their recommendation misleading the remaining shareholders into accepting a bid which, shorn of that portion of the consideration which goes to the directors, is at an inadequate price *(d)*".

The legislature saw fit to back up and extend the general equitable principle in this context. The material provisions are ss 191-194 of the Companies Act 1955. Section 191 lays down the principal rule. It reads:

> "It shall not be lawful for a company to make to any director of the company any payments by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, without particulars with respect to the proposed payment (including the amount thereof) being disclosed to members of the company and the proposal being approved by the company in general meeting".

The effect of the equivalent English legislation was summarised by the Jenkins Committee on Company Law Reform in the United Kingdom as follows *(e)*:

> "The general rule enacted by section 191, 193 of the Act is that any payment to a

(a) See *Weinberg on Take-overs and Mergers*, (3rd ed 1971) 377 n 1.

(b) *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n; *Phipps v Boardman* [1967] 2 AC 46.

(c) This is a mandatory requirement if the bid is governed by the Companies Amendment Act 1963.

(d) Weinberg, op cit, 381-382.

(e) (1962) Cmnd 1749 para 92.

director of a company 'by way of compensations for loss of office or as consideration for or in connection with his retirement from office' is unlawful unless it has been approved after full disclosure. Section 191 which relates to payment by the company, and section 192, which relates to payment (from any source) made in connection with a transfer of the whole or any part of the company's undertaking or property, require disclosure to the 'members' and approval by the 'company'. Section 193, which relates to payments made in connection with certain transfers of shares in a company, requires disclosure to and approval by the holders of the shares to which the offer relates. Section 194 (3) excludes from the application of this rule any bona fide payment by way of damages for breach of contract or by way of pension in respect of past services".

A breach of ss 191 and 192 makes the recipient director a constructive trustee and the payment is held in trust for the company *(f)*. Payments received in breach of s 193 are held in trust for shareholders who sold their shares as a result of the offer.

A severe deficiency in the working of the legislation was exposed in the recent litigation in *Rowe v Taupo Totara Timber Co Ltd (g)*. The plaintiff Mr Rowe became a director of the defendant company in 1964 and in 1969 was appointed by an agreement general manager for the term of five years. In 1971 a new agreement was made by which Mr Rowe was appointed managing director, again for a period of five years. A clause in this agreement entitled him to compensation, equivalent to five times his gross annual salary – tax free, in the event of his resignation following a change of control of the company. This clause (as the Judicial Committee observed) was obviously drafted with the object of providing for the possibility of a take-over of the company, which was at that time imminent. A take-over offer was indeed launched by NZ Forest Products Ltd in January 1972 (on the very day that the contract with Rowe was sealed) and was successfully completed a few months later. Mr Rowe duly resigned and claimed the agreed compensation (some $67,500 after having served as managing director for only six months); the company refused to pay. An action in the Supreme Court (unreported) failed.

The main issue on appeal was the effect of s 191. Speaking for a united Court of Appeal (Richmond P, Woodhouse and Cooke JJ) Richmond P held that the section did not apply because the payment contracted for was not in connection with Rowe's retirement from office *as director* but was related "solely to his distinct and separate office as managing director". The conclusion followed a Victorian decision, *Lincoln Mills (Aust) Ltd v Gough* [1964] VR 193 where Hudson J, dealing with a similar problem said:

> "[Where] it becomes apparent that [the payment] is compensation for the loss of the office of director or a consideration for retirement therefrom it will be unlawful unless the sanction of a general meeting has been obtained. If, on the other hand, the payment appears to have been made as a result of other considerations, then, even though it may be coincidental with the loss of the retirement from the office as a director, the payment will not fall within those prohibited by the section" (ibid, 199-200).

Lord Wilberforce, who delivered the judgment of the Privy Council, defined two issues: First, whether the section extends to payments made to persons who are directors in connection not simply with the office of directors but also with some employment held by the director. Secondly, whether it applies to a payment which the company is obliged, under contract, to make, or is it limited to payments which the company not being obliged to make, proposes to make? On the first point, their Lordships agreed with the Court of Appeal and Hudson J. On the second point, it was decided that section 191 does not apply to payments which the company is bound to make by contract. The section does not require members' approval for the initial obligation to pay compensation *(h)*. To read it as requiring such approval as a prerequisite for the subsequent *performance* would, their Lordships reasoned, put the employee, in the interim, in a difficult and uncertain position *(i)*.

(f) In addition, any director who has authorised payments in breach of section 191 is personally liable for misapplication of the company's funds – *Re Duomatic Ltd* [1969] 2 Ch 365, 374.

(g) [1976] 2 NZLR 506 CA; [1977] 3 All ER 123 Privy Council (Lords Wilberforce, Hailsham, Simon, Fraser).

(h) In principle, any contract between the company and a director including a contract of service requires an approval by the members: *Aberdeen Ry v Blackie Brothers* (1854) Macq 461. As a matter of convenience, this rule is often waived or modified by an exclusion clause in the company's articles – eg article 84, Table A, Third Schedule, Companies Act 1955.

(i) Such tentative obligation is not, however, exceptional. For example, a director can never be sure of his tenure. Despite any provisions in his service con-

It was finally held that in making the agreement the directors had acted in good faith and were entitled, in the circumstances, to take the view that protection of staff in the event of a take-over was in the interests of the company.

The decision runs contrary to what was hitherto believed by some leading writers to be the scope of s 191. Gower presupposes *(j)*, and Pennington expressly states *(k)* that the section would apply whether the compensation is paid for loss of office of director or for any other office under the company, as long as it is coincidental with retirement from the office of director. The distinction that was made in *Rowe's* case was not taken by the defendant director or by Buckley J in *Re Duomatic (l)* and was apparently considered immaterial. It is submitted that this view is more in line with the language of the section and with the policy that the legislation was designed to serve. The decision is open to the following criticism:

(i) Section 191 is drafted in what appear to be deliberately wide terms. It speaks of *any* payments to *any* director, as consideration for *or in connection with* retirement or loss of office. Purely as a matter of statutory interpretation, it is difficult to see how the restrictions formulated by the Courts can fit in with these terms.

(ii) The Court's disregard for the particular wording of the section is all the more remarkable considering that the expansive language portrays the intention of the legislator. Sections 191-194 were designed to catch all retirement-related payments to directors, not merely the quid pro quo for the lost directorship. The fact that a personal payment is made *to* a retiring director (not necessarily *for* his lost office) is the key factor. It is a symptom of a potential abuse which the legislator wanted to guard against. This conclusion is almost inevitable when one considers s 193. The section deals specifically with payment to a retiring director in consideration for the sale of his shares, yet calls it (using the same formula as in s 191) compensation for loss of office. "The payment has to be accounted for even though it is expressed to be in respect of his shares or is totally unconnected with the retirement" *(m)*. It is now arguable, following the logic of *Rowe*, that a working director may escape the provisions of s 193 by establishing that his other employment for the company is the reason for the compensation. Yet, such conclusion is in direct contradiction with the underlying concept of the section.

(iii) The distinction which the Privy Council drew between ex gratia and contractual compensation is a complete novelty. Again, it is difficult to reconcile with the sweeping language of the legislation. (With respect, the words "proposed payments" by which this conclusion is supported are of little assistance. Taken at their plain meaning all they say is that the payments must be approved before they are actually paid). Where the legislature intended to make exceptions it did so specifically (s 194 (3)). It is hard to imagine that such a fundamental distinction was left to conjecture.

The decision in *Rowe* is of considerable practical importance. It virtually exempts working directors from the operation of ss 191, 192 and perhaps 193. Invariably, it should not be difficult for a retiring executive director to attribute the retirement compensation to his other position in the company. The ripple may well extend to the take-over legislation in the Companies Amendment Act 1963. The Act requires *(n)* that directors disclose to their shareholders whether it is proposed in connection with the offer for the acquisition of the shares that any payment shall be made to any directors by way of compensation for loss of office and if so, particulars of the proposed payment. If *Rowe* is applied, working directors could all too easily avoid this requirement for the same reason *(o)*.

By excluding from the operation of s 191 compensation which arises out of a contract, the Privy Council has lifted what could have been an effective restraint of directors procuring for themselves protective service agreements when faced with a take-over *(p)*. (Indeed the decision

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tract, he may be removed from office at any time by an ordinary resolution of the members: Section 187 of the Companies Act 1955. His remedy in such case is damages for breach of contract: s 187 (b).

(j) See Gower's discussion of the statutory rules in *Modern Company Law* (3rd ed 1969) 540-544.

(k) *Company Law* (3rd ed 1973) 495-496. Pennington distinguishes *Lincoln Mills* (supra, in the text) because of the different wording of the equivalent Victorian section. This case is ignored by Gower, op cit, and by *Palmer's Company Law* (22nd ed 1976).

(l) Supra, note (f).

(m) Gower, op cit 543.

(n) Section 5 and the Second Schedule, para (d).

(o) Quaere whether such payment would come under para (e) of the Second Schedule which requires a disclosure of the existence (but no particulars) of any other agreement or arrangement between any director and any other person in connection with the offer.

(p) The effect is compounded by the fact that in New Zealand unlike in the United Kingdom (Companies Act 1967 section 26) the members do not have a statutory right to inspect service contracts of directors.

in *Rowe* may be interpreted by some as an indirect support of such practice *(q)*. To be sure, such an act must past the test of being in the interests of the company, and for the proper purpose of the directors' power to hire staff. But this test is predominantly subjective (the decision is left to the directors' own honest discretion) and is notoriously difficult to apply effectively.

The decision in *Rowe* was clearly influenced by the desire to protect the interests of an employee who is also a director. In adopting this approach, however, the Courts seem to have overlooked the consideration of the protection of the investor, which underlies the material legislation. It is respectfully thought that the restrictive interpretation of s 191 was warranted neither by the language nor by the spirit of the legislation and has seriously eroded its effectiveness *(r)*. The virtual exclusion of service directors from accountability under sections 191-194 is particularly significant in view of the rise in numbers of executive directors on company boards in recent years. (It is currently estimated in New Zealand as between one third and a half of all board members of the larger companies). Moreover, the extra powers wielded by inside directors justify closer scrutiny.

Sections 191-194 were designed primarily as a safeguard against a possible abuse by a director of his position in the process of take-over of a company. It is regrettable that the operation of these provisions has been cut back by judicial interpretation at a time when the prevalence of take-overs and, often, their ferocity, underline the need for effective supervision.

(q) It should be noted, however, that in *Rowe's* case the company was apparently vulnerable to a take-over and it has been the policy for a number of years to enter into service contracts with its senior officers giving them protection in the event of a take-over. The Privy Council held that in the circumstances this view was "clearly one that reasonable and honest directors might take. In its absence, the staff might be likely to go elsewhere". But cf *Hogg v Cramphorne Ltd* [1967] Ch 254 where an allotment of shares to friendly hands to defeat a take-over was held invalid despite the fact that the directors honestly believed that they were acting in the company's interests because inter alia, a change of control might have an unsettling affect on the employees.

(r) The Jenkins Committee, Cmnd 1749 para 93, recommended that the legislation be tightened by certain amendments demanding that the approval required by sections 191-193 should be by special resolution and be extended to retirement payments to a director of a subsidiary company.

Rules need sanctions — A disturbing civil liberties issue is highlighted again by *Jeffrey v Black, The Times,* 15 July, although it is not one on which the law is open to change except by legislation. The defendant was arrested for stealing a sandwich from a public house, and police officers insisted on searching his room which they had no authority to do. There was no suggestion that they suspected a further cache of sandwiches. What they did find was cannabis, and the defendant was charged with illegal possession of it. The justices dismissed the case because the evidence was gathered illegally, but the divisional court remitted the case for rehearing before a different bench, because it is established that evidence irregularly gathered is not thereby excluded: *Kuruma v R* [1955] AC 197. Related issues were recently debated in a Commons committee which considered a proposal, which was subsequently withdrawn, that legislation should provide that a statement obtained in breach of the Judges' Rules should not be admissible in evidence. It is fair in these cases to argue that criminal proceedings should not be treated like a game of tennis, with technicalities being returned determinedly back across the net. The facts are the truth: once known, why should they not be brought out? That is rather simplistic. The whole object of the criminal law is to provide a framework to support our society, and our freedoms are a treasured part of the structure. Trampling over private property rights, without the available formality of a search warrant, is not acceptable. If a case comes to the surface, it is probably not isolated, although the practice may not be common. The simple way to stop it seems to be to make it fruitless. If evidence obtained that way could not be used, it would not be collected that way. This may be one of the many matters that the newly announced Royal Commission on criminal procedure should consider. *The Solicitors' Journal.*

LEGAL PROFESSION

NEW ZEALAND LAWYERS AND SOCIAL POLICY

By Craig Brown *Assistant Professor of Law, University of Western Ontario, Canada – a New Zealander who has been studying and teaching in the USA and who has now alighted over the border.*

New Zealand's accident compensation scheme invariably arouses considerable interest among North American lawyers when it is described to them. They are particularly fascinated by the fact that the right to sue for damages for personal injury has been almost totally abolished. What they find particularly difficult to understand is how New Zealand lawyers ever allowed this to happen. In recent years schemes providing for some compensation without regard to fault in automobile accident cases have been implemented in numerous US and Canadian jurisdictions but for the most part they have not infringed substantially on traditional tort rights, principally because of the influence of lawyers either as legislators or lobbyists.

In this paper I have brought together the thoughts that I have offered from time to time in attempting to explain this contrast from the point of view of a New Zealander observing the North American processes. While I begin by examining the issues involved for lawyers in the accident compensation question itself, this in turn gives rise, at least in my mind, to some reflections on the comparative roles of North American and New Zealand lawyers in the process of policy-making generally. It is fairly readily apparent that members of the profession in New Zealand are, either collectively or individually, much less active in this respect than are their North American colleagues and it is the exploration of reasons for this difference that I have found interesting.

The accident compensation question

Recovery for injury without regard to fault is not a new idea in the United States. Workers' compensation, under which employers are absolutely liable for injuries sustained by their employees in work related accidents and under which the employees have no additional right of claim through the Courts, has existed there since 1910 *(a)*. Yet attempts to extend the concept to injuries occurring outside of employment situations have met the stiffest resistance, especially from lawyers. In 1932 the first proposal to introduce no-fault recovery in respect of automobile accidents was made but it was not until 1970, when the State of Massachusetts enacted a scheme of sorts, that the idea was brought to life in any form. Since that time the concept has been implemented in varying types in some 23 other states *(b)*, but none of these schemes has abolished completely the right to sue for damages under traditional tort theory. The most extensive scheme is in Michigan where there is no-fault coverage (provided by private insurers) for unlimited medical expenses and up to $1,000 per month for a maximum of three years for certain other types of economic loss. To the extent no-fault benefits are not payable the negligence action is retained *(c)*. The other schemes either have limits on the no-fault medical costs coverage with traditional liability covering the excess *(d)*, or simply add a no-fault benefit to the traditional system without abolishing any tort liability *(e)*.

So it is evident that despite the assertion that "no-fault automobile insurance seems finally to have come of age"*(f)*, there has hardly been a revolution bringing about the demise of tort liability. As I have indicated, one of the principal reasons

(a) The first scheme was enacted in New York. Programmes are now operated in every state and by the federal government. It is estimated that about 80 percent of civilian wage and salary earners are covered. See Conrad and others, Automobile Accident Costs and Payments – Studies in the Economics of Injury Reparation. 31 (1964).

(b) For a review of the schemes so far adopted see O'Connell and Henderson, *Tort Law, No Fault and Beyond* 278 (1975).

(c) Mich Comp Laws, ss 500:3101-3179 (Supp 1974).

(d) Such schemes either have a monetary limit (eg Florida, see Fla Stat Am, ss 627.730-741 (1972) or a narrative threshold whereby certain serious injuries are specified as being still subject to tort actions (eg Colorado, see Colo Rev Stat Am, ss 13-25-1-23 (Supp 1974).

(e) Eg Virginia, see V9 Code Am s 38.1-380.1 (Supp 1974).

(f) O'Connell, *Ending Insult to Injury* 70 (1976).

for this slow rate of progress (although, as will be obvious, the appropriateness of that term is the subject of considerable debate) has been and is the stout opposition put up by the legal profession. This is particularly true of the trial bar. The sceptic would immediately attribute this to the considerable vested interest that trial lawyers have in retaining the traditional system. In personal injury cases remuneration is normally by contingent fee, typically one third of the amount received, (if any), by the plaintiff either by judgment or settlement. Newsweek magazine recently estimated that the best negligence lawyers can earn close to a million dollars a year *(g)*.

Naturally enough, lawyers do not make express reference to their self-interest. Appeals are made on the basis of the alleged merits of the traditional system, such as the right to full compensation for pain and suffering, and on the basis of philosophy *(h)*. In either case the attacks on the reform concept have been bitter *(i)* and they have undeniably stemmed efforts to implement no-fault on a wide-ranging scale both in the extent of coverage under particular schemes and in the number of jurisdictions adopting any scheme at all.

The introduction of the New Zealand Scheme, on the other hand, was hardly impeded at all by the legal profession even although it abolished the tort action in personal injury cases entirely *(j)*.

When the 1967 report of the Woodhouse Commission was being prepared, the New Zealand Law Society sent questionnaires to all of its approximately 2,500 members seeking views. The diversity of opinions expressed led the Society as a body to consider itself unable to express a view. Surprisingly enough, included among the supporters were practitioners who were prominent in personal injury litigation *(k)*. Because of this lack of unity, lawyers as a group presented no opposition to the central proposal – to replace the traditional system. Instead, in its submissions to the Commission and to the Parliamentary Select Committee which considered the question of implementing the recommendations of the Commission, the Society was obliged to confine itself to suggesting modifications to the scheme without attacking the no-fault concept *(l)*. Ironically perhaps, the plea for consistency of treatment of all types of injury led to its advocating a wider scheme should any scheme be adopted at all *(m)*.

It is true that individual lawyers, and some local groups, remained fervently opposed to the proposals for reform *(n)*. It is also true that some opposition persists even after three relatively successful years of operation. In 1976, a letter to the editor of the *New Zealand Law Journal* declared, "This legislation offers no more than niggardly awards in return for the common law rights to complete compensation which have been filched from us all" *(o)*. Nevertheless such protestations are becoming more and more isolated and it does not seem likely that the present system of accident compensation will be done away with in the foreseeable future. Certainly not, it would seem under pressure from the legal profession *(p)*.

The first, and seemingly obvious explanation of the contrast lies in the extent of the loss facing lawyers when personal injury litigation is removed. Reference has already been made to the earnings available to the successful personal injury attorney in the United States. By comparison the tort-law-

(g) *Newsweek* 14 March 1977, p97.

(h) Professors Blum and Kalven in urging a higher level of debate on no-fault lamented that among the legal profession "at most an occasional spokesman has sallied forth in the journals to stigmatise the plans as socialistic departures from the American way of life." Public Law Perspectives on a Private Law Problem 7 (1965).

(i) A recent example appeared in the form of a review of Professor O'Connell's latest book on no-fault – Ending Insult to Injury (1976) – by John O Haywayd, a former director of the Association of Trial Lawyers of America Products Liability Exchange. The review appeared in the July/August 1975 issue of Juris Doctor.

(j) It is possible that the common law action may still be available in some instances (see Vennell, "Some Kiwi Kite Flying" [1975] NZLJ 254) but such cases would be too rare to affect the revolutionary nature of the scheme.

(k) See the remarks of Mr JB O'Regan during the course of a 1972 discussion on public relations and the profession, reported in [1972] NZLJ 588.

(l) *Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand*, para 158 (1967).

(m) Ibid para 158.

(n) For a discussion of the views of lawyers generally see Palmer and Lemons, "Toward the Disappearance of Tort Law – New Zealand's New Compensation Plan", 1972 U of Illinois Law Forum 693, 728.

(o) [1976] NZLJ 454.

(p) By way of comparison with the prevailing attitudes in the United States, it is interesting to observe the apparently reversed positions respectively of the insurance industry and the legal profession in New Zealand. There the insurance interests remained firmly opposed to accident compensation while in the United States the industry has by and large come around to favour the introduction of no-fault automobile insurance. The New Zealand industry's position is more understandable, however, when it is realised that the scheme proposed advocated the exclusion of private insurers except in the role as agents for the government insurer. Perhaps the American insurance industry's support provides a further reason for lawyers' opposition. In a recent discussion with the author, a Washington (State) attorney attributed some of his doubts about no-fault insurance to the fact that insurance companies were for it. Anything they were for must be open to suspicion, it was declared.

yer's earnings in New Zealand were negligible. The contingent fee was not explicitly the basis for remuneration, although it was probably true that "fees tended to cluster at seven or eight percent of the amount recovered" *(q)*. (It is also true, however, that unsuccessful plaintiffs would still have to pay.) Obviously seven or eight is much less than 30 percent but, more than that, the average amount of recovery was much lower than in comparable American cases, even taking into account differences in income and cost of living *(r)*. Moreover, the number of cases coming to trial or even involving the services of a lawyer appears to be proportionately lower *(s)*. Whatever the exact figures are it is undoubtedly true that New Zealand lawyers do not look upon trial work (either criminal or civil) as a lucrative source of income *(t)*. Perhaps one further reason for this is that, as a rule, New Zealand lawyers cannot refuse to take on a client. Thus, a possible method of increasing income (by better using the long hours otherwise spent on unprofitable, potentially unsuccessful as low-yielding, cases), is denied the New Zealand lawyer – unlike the situation prevailing in the United States *(u)*.

Another point is that abolition of personal injury litigation directly affects only trial lawyers. In the United States the special interests of these members of the profession are represented by a specialised body, the American Trial Lawyers' Association, and it is this organisation rather than the bar as a whole which has provided the real impetus for the successful lobbying efforts referred to above. In Canada, the Advocates' Society has filled the same role, being particularly effective in Ontario for example where the no-fault automobile insurance plan does not cut at all into the traditional tort system. In New Zealand, of course, there is no corresponding body. Although some members of the profession practise as barristers only and others tend to devote most of their time to litigation, their number is not significantly large. In any event, they appear not to have considered forming a common interest group. As a result, it is possible that the special concerns of Court lawyers are given less emphasis than might otherwise be the case.

Lawyers and social policy generally

These considerations notwithstanding, it is possible that the stance, or rather lack of one, by the New Zealand profession with regard to accident compensation has a more general explanation. Unlike their North American counterparts, New Zealand lawyers traditionally have not regarded themselves as having a special place in the process of formulating social policy simply by virtue of membership of their profession.

This seems to have been one of the reasons behind the formation of the New Zealand Legal Association whose initiators were dissatisfied that the Law Society was not involving itself in matters of public debate. The Association has also been concerned with the restrictions placed on individual lawyers against entering into public debate – as lawyers. Until quite recently, when a lawyer became involved in any form of public discussion he was precluded from describing himself as a member of the legal profession *(v)*. To do so would have been tantamount to advertising.

This type of restriction has, of course, been loosened in recent years and lawyers are able now to make more meaningful contributions to discussions on matters of general concern such as consumers' rights. As a group, however, the Law Society continues by and large not to involve itself in public debate. This continues to be the source of disappointment for some members. In 1972, one lamented:

> "... we only need to see the way in which our medical friends speak up on matters of public issue, even though they are of a political content, to realise what the New Zealand Law Society might be able to achieve if it adopted a more aggressive attitude on matters of public, political, and social concern" *(w)*

No doubt such views are still held by many. In response to this, the Society pleads diversity of opinion among its membership. As mentioned, the accident compensation question provided a prime example of this. In this regard, the Secretary of the Law Society has said:

> "Within the ranks of the Society there are so many different shades of political opinion and so many different attitudes to social measures

(q) See Franklin, "Personal Injury Accidents in New Zealand and the United States: Some Striking Similarities", 27 Stanford LR 653, 668.

(r) Ibid 667-8 (footnote 90).

(s) Ibid 669.

(t) As one writer put it: "Most law firms see Court work as unprofitable public service. Analyses made in England demonstrate quite clearly that most firms there subsidise Court work from more profitable work such as conveyancing and estates. The same is undoubtedly true in New Zealand." Ludbrook, "The Lawyer and the Community" [1974] NZLJ 374.

(u) See Shayne, *Making a Personal Injury Practice Profitable*, 27 (1972). A section is devoted to "The art of refusing a case".

(v) Recall, for example, a lawyer who regularly took part in a television current affairs show in Dunedin in the 1960s as a commentator was always introduced as being "prominent in community affairs". Other commentators were listed by occupation.

(w) Remarks of DL Tompkins recorded in [1972] NZLJ 585.

> that it is a virtual impossibility for the New Zealand Law Society to express the views of the lawyers of New Zealand on any particular issue which might be before the Government or in the forefront of public thinking at any particular time. For the Council of the ... Society to go on record on any issue with a social significance I think would be to betray at least a fairly large number of its membership" *(x)*.

Such restraint is not typically exercised by other bodies of wide membership. Reference was made to the medical profession and its preparedness to speak out. Similarly, trade unions, organisations of farmers, veterans, employers and many more groups frequently speak out in New Zealand on issues of general concern. Statements are issued by executive officers or committees and it is never assumed that all members necessarily concur. It is the same with the organised bar in the United States. The American Bar Association obviously sees itself as being concerned with the immediate interests of lawyers. In 1976 the Association had 72 committees working on its programmes which ranged from "highly professional concerns ... to matters remote from the practice of most [lawyers], such as prisoners' rights, rights of the mentally ill, and the development of better procedures to aid the planning of the President and Congress in matters related to the national economy" *(y)*.

All this demonstrates that the New Zealand legal profession does not perceive itself collectively as a political pressure group in the established sense. It is true that the Law Society does make a "quiet behind the scenes" input into some legislation for which it may not get full credit *(z)*, but it rarely takes a public stand on anything in the slightest bit controversial. Certainly it would be unlikely to conduct a campaign for or against some measure of general government policy as its American counterpart would have no hesitation in doing.

It bears repeating that there are individual lawyers, and indeed small groups of them, who are prepared to stand up and be counted, as lawyers, on given issues. As mentioned, this occurred with respect to the accident compensation plan. Now that restrictions on public statements by lawyers identified as such have been relaxed this is likely to happen more frequently *(aa)*.

It is interesting to note, however, that individual lawyers in New Zealand do not play a significant role in public life compared to their North American colleagues. Of course, over the years, many New Zealand lawyers have been active in politics, particularly at the local level, serving on city, borough, and county councils, but there have been relatively few in positions close to the centre of power in national politics, at least in recent years. Compared with the typical legislature in the United States, Parliament contains few lawyers *(ab)*. The Attorney-General is the only member of Cabinet with a law degree and he has never practised law. This will no doubt change in the future. Several lawyers were elected to Parliament in 1975 and they presumably could rise to positions of power in future Cabinets. For the time being, however, lawyers in New Zealand cannot look to many of their own who have a hand on the reins of power in order better to represent any special interests they may have.

One of the reasons for this is undoubtedly the relatively low rate of remuneration received by Members of Parliament. In addition to this, however, it is observable from recent New Zealand political history that there is predilection among the electorate against having people with advanced formal education in high positions of power. Obviously, many factors determine the outcome of any given election but it is not without significance that since World War II of the eight New Zealand Prime Ministers, only two have had a university education – one was a lawyer. In both cases the men concerned came to power in the middle of a parliamentary term because of the death or retirement of the preceding Prime Mini-

(x) Remarks of WM Rodgers recorded in [1972] NZLJ 586.

(y) "President's Page", 62 American Bar Association Journal 155 (1976).

(z) Sir John Marshall, a former Prime Minister of New Zealand and a lawyer has applauded the New Zealand Society for its public work done quietly behind the scenes. In "The Lawyer's Responsibility to Society", [1975] NZLJ 731, 733 he stated: "Of the profession as represented by the Law Society, I do not think that the public knows enough. I think particularly of the work which the Law Society does in relation to Parliament, in keeping a vigilant eye on legislation, and in making representation fearlessly and impartially when it feels any legislation infringes on well established constitutional or legal principles." It is notable that this cannot be said with respect to the accident compensation scheme which rather more than "infringed" on established legal principles.

(aa) *It is interesting, though, that lawyers in Canada,* who are not subject to such inhibiting factors, have recently been criticised by a prominent Judge as "reactionary conservatives more concerned with making money than promoting social change". "Judge Complains Lawyers Lacking in Social Concern", *London Free Press,* 31 August 1977 at three, col one.

(ab) In 1975 there were six lawyers among the 87 Members of Parliament. See Sir John Marshall, [1975] NZLJ 733. At the time the Accident Compensation Bill was first introduced there were five. See Palmer and Lemons, p741.

ster, and in both cases they were defeated heavily at the next election.

This contrasts markedly with the situation prevailing in the United States, lawyers in particular pervade the political scene. In the current Senate, for example, 64 of the 100 members are lawyers or at least have legal qualifications; almost all of the remainder have a university education *(ac)*. A similar contrast is apparent between the New Zealand Parliament and Canadian legislatures.

These factors aside, it is possible that the New Zealand lawyers' comparative inactivity in politics may be attributed to a certain narrowness of outlook which results from the education he or she typically receives before entering practice. The education undergone by most professional school graduates in New Zealand is rather narrow by American standards and the typical lawyer's education is no exception. Although the high school curriculum has undergone changes in recent years most of the people currently practising law in New Zealand are products of a system which denied them exposure to any more than the barest fundamentals of, for example, a scientific discipline. After three years of high school, a basic choice had to be made between sciences and liberal arts (in the "academic" schools or sections of schools in which most prospective lawyers would be). Most people who eventually become lawyers would take arts.

After high school there is no requirement that the law school entrant first complete what in the United States would be termed an undergraduate degree. Some people choose to complete a bachelor of arts or commerce concurrently with their law degree but these would still be significantly in the minority. The general rule is for students to undertake one year of courses largely of their own choice (three subjects from any fields) in addition to a compulsory, introductory course in law. From then on law subjects are taken exclusively until, after three more years, graduation and, after one additional year, admission to the bar.

In North America it is compulsory for persons entering law school to have completed either a four year degree covering a wide range of subjects – typically prospective law students choose a heavy emphasis of political studies – or at least two years of general, university study.

In addition to the structure of a lawyer's overall education, the substance of the material dealt with in North American law schools is, from the perspective of this paper, significantly different, at least in the United States. This results directly from the view taken, at least theoretically, of the role of the Courts (and through them, the lawyers in their professional capacity) in relation to the legislative branch of government. The Courts are much more reluctant in New Zealand than they are in the United States to shape decisions (explicitly, at least) largely on the basis of policy considerations only. In this respect the teachings of the English Courts have been followed. What this amounts to is captured in the following excerpt from the judgment of Parke B in the 1853 case of *Egerton v Earl Browlow* in the House of Lords *(ad)*.

> "[Public policy] is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; . . . To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community."

It would be misleading to suggest that policy considerations are never given weight in New Zealand decisions but it is a fair assertion that the traditional English approach still has a great impact on the way the Courts view their constitutional role and thereby conduct themselves. Perhaps partly because of the relative ease with which Parliament can legislate to overturn a judicial interpretation of the law *(ae)*, the Courts frequently make reference to this option in making pronouncements as to the state of existing law. Of course this approach is due largely to a constitutional structure which is entirely different from that in the United States. Parliament is supreme in that structure in the sense that while it can overrule by legislation pronouncements by the Courts (as far as later cases are concerned), the Courts

(ac) According to the biographical notes published in the Congressional Index of the 95th Congress. This state of affairs, of lawyers in government generally – seems not always to meet with universal approval. Commerce Secretary Juanita Kreps recently said, when referring to the wealth of economists like herself in the present administration, that "whatever our failings, it may be reassuring to note that we don't have to do much to improve on the lawyer's record". *Wall Street Journal*, 10 March 1977, at 12, col three.

(ad) Four HLC one, 123.

(ae) See Palmer and Lemons, 741.

cannot overturn an enactment on constitutional grounds. Not only do the Courts not have this function constitutionally, it is usually considered that they are not as equipped to handle that type of deliberation as American Courts seem to be *(af)*. Nevertheless, it is possible for matters of policy to be given much more emphasis than it is, even given this structural setup.

Once again, all this contrasts strongly with the situation, particularly in the United States. Policy considerations are explicitly given great weight in the deliberations of the Courts, especially the higher Courts. Arguments of counsel often sound more like speeches in Parliament with their emphasis on policy, sometimes almost to the total exclusion of references to passages from cases and statutes. As a result, the law student is of necessity acquainted with this type of thinking from an early stage.

The relevance of this to the theme of this paper is that this narrower view of the function of New Zealand Courts, at least as taught in law school, is perhaps reflected in the thinking of lawyers. Their education and professional experience have generally attuned them to a more limited view of the role of the Courts. Where matters of politics are concerned, the remedy is regarded as lying with the politicians, not the Judges. Because of this, it is possible that lawyers see their own role as being more restricted as far as policy is concerned. Certainly the education which most present lawyers had in law school emphasised the defining and application of rules to particular situations, almost to the total exclusion of public policy considerations (except where policy had in the past been encapsulated into "rules"). As with much in New Zealand legal education, this is changing but, insofar as it can be said to be a reason for a particular outlook, it will be some time before the changes have a wide-ranging effect on that outlook.

Conclusion

I have attempted here to point to certain differences in the way lawyers conduct themselves in two separate social contexts and to offer some explanations for those differences. It has not been my intention to advocate one approach as against the other. I certainly could not suggest the wholesale adoption of North American attitudes and approaches in New Zealand although it is my view that generally there is room for New Zealand lawyers, both as a group and individually, to give greater attention to matters outside their immediate area of interest.

As in most things, there are serious consequences in either of the extreme points of view on this question of involvement in public affairs. Too little involvement (in the scope of issues addressed), and I think the New Zealand profession tends towards this, means that an important contribution to policy decisions is missing. On the other hand, if the involvement and influence of the profession is too great this is equally disadvantageous for society. It is in some ways ironic that the accident compensation issue led me to think about this whole subject because, returning to it now after examining these wider considerations, it is apparent that North American lawyers have used their well-established position of eminence in the policy-making process to protect what is undeniably a matter of immediate and vested interest, to the detriment, it can be argued, of the interests of the community at large. In contrast, the New Zealand profession's lack of such power and inclination meant that a measure which was against the direct interest of lawyers but, arguably at least, of benefit to society at large, could proceed unhindered. Indeed, in this light the profession can be seen to have acted with a great sense of responsibility.

One final note: after having worked my way through the preceding analysis, I came across the following advertisement which appeared in the *New Zealand Law Journal* in August of 1973. Perhaps it, more than anything else, explains the special attitude New Zealand lawyers generally have to wider questions:

THIS IS THE FIRST AND LAST
INSERTION OF THIS ADVERTISEMENT

> "Shortly a three man country law firm in a delightful part of the North Island with a Utopian climate will have a vacancy for a Solicitor. Applicant should preferably be married, 25-35 years old, experienced in conveyancing, able to look intelligent in a Magistrate's Court and able to play golf or catch fish . . .
> ". . . If interested please write etc. . . . Those who like to work outside normal office hours and weekends need not apply.

Who, after all, can be critical of that?

My item last week about what a group of ladies of easy virtue might be called, has brought in many suggestions, some of them unprintable. The ones I like best are: a company of solicitors, an anthology of prose, a bank of oars – *The Times.*

(af) "It is usually admitted that American Judges have more experience in and affinity for politics than their counterparts in the Commonwealth." Palmer, "The Political Conscience of a Judge", [1972] NZLJ 112.

CRIMINAL LAW

CULPABLE HOMICIDE — PART II

Continuing a commentary on the Report of the New Zealand Law Reform Committee by Dr GF ORCHARD, *Senior Lecturer in Law, University of Canterbury. Part I, which discussed provocation appeared in [1977] NZLJ 411.*

Part II of the Report: Manslaughter

Committee's recommendations

Once again the proposals in this part of the Report are of wider significance than might be suggested by the title.

The Committee makes recommendations to the following effect:

(1) The offence of manslaughter should be abolished. The first part of the Report proposes the abolition of manslaughter under provocation and this part proposes the end of "constructive manslaughter". The most important instances of this offence consist of killing by an unlawful act or omission, contrary to s 160 (2)(a) or (b) of the Crimes Act 1961, the offence not being murder within ss 167 or 168.

(2) The offences of wounding and injurying with intent (ss 188 and 189) should be abolished, as well as a number of other offences against the person or public (eg ss 145, 151-153, 155-157). These offences, and "constructive manslaughter", would cease to be necessary upon the adoption of the next recommendation.

(3) Two new sections should be enacted. These will be considered in detail below but the offences they would create may be briefly described as consisting of conduct intended to cause grievous bodily harm or some lesser personal injury, or conduct likely to cause such harm or injury, done with "reckless disregard to the safety of any person or of the public". This latter phrase is intended to encompass "gross negligence" and the offences could be committed even though no harm resulted from the conduct in question.

The reasons

The Committee found that the existing law is uncertain or unsatisfactory in a number of respects. Some of these are peculiar to the law of culpable homicide and, in view of the broad sweep of the Committee's recommendations, may be thought to be relatively minor. Thus, it was noted that the meaning of "unlawful act" in section 160 (2)(a) is somewhat uncertain, although it would probably be held to mean "offence" (the modern common law position: *Lamb* [1967] 2 QB 981). The Committee thought this meaning should be formally adopted by the Legislature (Report, para 50), although this would be of little significance if manslaughter is abolished. It was also noted that, although the Crimes Act is quite silent on the point, it is possible that the "unlawful act" must be one that is likely to harm a person (*Grant* [1966] NZLR 968 CA, adopting the rule developed at common law: see, eg *Larkin* [1943] 1 All ER 217; *Church* [1966] 1 QB 59; *Creamer* [1966] 1 QB 72). There had been some suggestion in England that the accused himself must have realised that harm might result (*Gray v Barr* [1971] 2 QB 554, 568), although since the Report the House of Lords has made it clear that this is not required, it sufficing that the act was objectively dangerous (*DPP v Newbury* (1976) 62 Cr App R 291). The Committee would require actual realisation of the risk of "harm" on the part of the accused *or* "gross negligence", which is said to be different from the "wholly objective" test in some English cases (Report, para 53).

In respect of killing by an omission to comply with a legal duty, the Committee noted that in New Zealand it has been held that because ss 155 and 156 expressly require "reasonable" care, there may be criminal liability for mere "civil" negligence (*Storey* [1931] NZLR 417 CA; *Dawe* (1911) 30 NZLR 673 CA), although there have been contrary decisions in Canada and Australia, and even in New Zealand "gross negligence" is required where there is no such statutory specification of the standard of care (*Burney* [1958] NZLR 745). The Committee concluded that in the proposed reforms "gross negligence" should be required as a minimum degree of fault in all cases (Report, para 60).

In addition to these points the Committee had two major criticisms of this area of the present law. First, chance plays too great a part in determining criminal liability. A person may be guilty of some grossly negligent conduct but may be saved from liability for a serious offence by "a lucky stroke of chance" — some intervening event which prevents death but which is quite irrelevant to the moral culpability of the actor (the example given is the possibly unlikely one of "a miraculous piece of surgery", but the same

point may be made simply by reference to grossly negligent conduct which does not happen to cause any harm at all). Or a person may commit a relatively minor offence, but this is converted into manslaughter if death results even though such a result was not reasonably foreseeable. The Committee concluded that this position could not be justified (Report, para 45), but it is noteworthy that in relation to the latter example (a case of "manslaughter by an unlawful act") the Committee's criticism of the present law would be rather weakened if the New Zealand Courts were to require that the offence was such that really serious injury was foreseeable, a test favoured by some Australian Judges (see *McCallum* [1969] Tas SR 73; *Phillips* [1971] ALR 740, 758, per Windeyer J; and see *Fleeting (No 1)* [1977] 1 NZLR 343, 346). The English cases suggest that it is enough if *any* harm is foreseeable, and such a test certainly makes it more possible that a minor offence may be converted into a major one "as a result of unusual and unforeseeable consequences" (Report, para 48).

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Secondly, the Committee noted that grossly negligent conduct is treated as a minor matter if for any reason harm does not actually occur (if it is criminal at all), and declared its belief that "the sanctions at present provided are quite inadequate for grossly negligent conduct that does not happen to result in death" (Report, paras 45, 48). This reasoning led the Committee to propose the creation of new offences which would replace much of the present law relating to serious offences against the person, and which would require the occurrence of no actual harm at all. These proposals raise some quite fundamental questions about the scope of the criminal law, but before they can be examined more closely it is necessary to set out the proposed offences.

The proposed offences

"Dangerous act or omission – (1) Everyone is liable to imprisonment for a term not exceeding 14 years who –

"(a) does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to cause grievous bodily harm to any person; or

"(b) with reckless disregard for the safety of any person or of the public, does any act or omits without lawful excuse to perform or observe any legal duty, such act or omission being one likely to cause grievous bodily harm.

"(2) This section applies whether or not the act or omission results in death.

Injurious act or omission – (1) Every one is liable to imprisonment for a term not exceeding five years who –

"(a) does any act or omits without lawful excuse to perform or observe any legal duty, with intent to injure any person; or

"(b) with reckless disregard for the safety of any other person or of the public, does any act or omits without lawful excuse to perform or observe any legal duty, such act or omission being one likely to cause injury or endanger safety or health.

"(2) This section applies whether or not the act or omission results in death.

Commentary

Some draughting points – In one respect the draughting of these proposals seems to be inept. Both contain a provision to the effect that the offences are committed "whether or not the act or omission results in death". Nevertheless, these provisions would replace not only the present offence of manslaughter but also exist-

ing provisions relating to wounding and injuring, and the offences would be committed "irrespective of the result of death or even of harm" (Report, para 64). If it is necessary to have any negative provision describing what does not have to happen (and it may be doubted whether any such provision is needed) it is difficult to understand why only one type of unnecessary harm (death) is mentioned.

It is also noteworthy that in relation to the available penalty no distinction is drawn between he who intends to cause grievous bodily harm and he whose "reckless" conduct is likely to cause such harm. This represents some departure from the existing legislative pattern in that ss 188 and 189 provide different maximum penalties which depend to some extent on whether the offender intended grievous bodily harm, or intended some lesser injury or was merely reckless (the latter two being equated, as they are in the Committee's second proposal). There can be little doubt, however, that the distinction between these different degrees of fault would remain important to the determination of the actual sentence in each particular case, especially as the Committee makes it clear that "reckless disregard" is meant to include "gross negligence", so that the accused need not have "realised that his act might cause harm" (Report, para 53). Moreover, it seems that the degree of fault established in any particular case would be apparent from the verdict or plea of guilty in each case. The Committee's proposals appear to contain four distinct offences (conduct intended to cause grievous bodily harm, recklessly performed conduct likely to cause such harm, conduct intended to cause such harm, conduct intended to cause injury, and recklessly performed conduct likely to cause injury); it would be wrong for any one count or information to allege more than one of these offences, and thus the degree of fault would be revealed by the verdict or plea on the charge preferred.

As already mentioned, the Committee intend that "gross negligence" should be sufficient degree of fault, and thus would not require that the accused actually adverted to the likely harm or injury. It may be doubted, however, whether the chosen formula ("reckless disregard for the safety of any person or of the public") is really appropriate for achieving this object. There are a number of provisions in the Crimes Act 1961 to the effect that an offence is committed if specified things are done "with intent to injure any one, or with reckless disregard for the safety of others" (ss 188 (2), 189 (2), 198 (2), 202 (1)), and the Committee apparently assumes that the latter words are appropriate for imposing liability for "gross negligence". But this formula does not seem to have been the subject of judicial interpretation in New Zealand and its true meaning is disputable.

It is well known that the term "reckless" is used in two distinct senses in the law. Sometimes it is used to describe a person who foresees that a prohibited event might occur, but who consciously takes an unjustifiable risk that this might happen: here the term requires advertence to the risk and is *not* equated with gross negligence (eg *Pemble v The Queen* (1971) 124 CLR 107; *Morgan* [1976] AC 182; *Herrington v British Railways Board* [1971] 2 QB 107, 125-126, per Salmon LJ; [1972] AC 877, 921, per Lord Wilberforce; *Southern Portland Cement Coy v Cooper* [1974] 2 AC 623 (PC) at 642; Lord Denning has said that this is the "classical" meaning of "recklessness": *Pannett v McGuiness* [1972] 2 QB 599, 606; and see Smith and Hogan, *Criminal Law* (3rd ed), 45; Glanville Williams, *Criminal Law, The General Part* (2nd ed), para 25). On other occasions the term is used to describe gross negligence, which does not require such advertence (eg *Andrews v DPP* [1937] AC 576; *Stone* [1977] 2 WLR 169; *Herrington v BRB* [1971] 2 QB 107, 137-138, per Cross LJ; compare *Briggs* [1977] 1 WLR 605 and *Parker* [1977] 1 WLR 600; and for further examples of conflicting judicial usage, see Words and Phrases Legally Defined (2nd), Vol 4, pp 272-273). It has been suggested that the ambiguity of the term is such that its use should be avoided in directing a jury (*La Fontaine v The Queen* (1977) 51 ALJR 145, 150-151 per Gibbs J). The word "disregard" does not make the meaning of "reckless" any clearer and it thus seems fair to conclude that the Committee has adopted a formula which might or might not succeed in achieving the object intended; given the notorious ambiguity of the expression, the Courts could well interpret it in favorem libertatis and require actual advertence to the risk.

Liability for gross negligence – At this point a rather more important question must be asked: *should* gross negligence be sufficient for criminal liability (in the context of serious or "truly criminal" offences)? The Committee's response on this point is, to say the least, disappointing. Having declared the view that the present sanctions for grossly negligent conduct not resulting in death are inadequate (Report, para 45) it notes that at common law killing by negligence is manslaughter only if the negligence is gross (Report, para 54). There is then a footnote which concedes that "some writers" maintain that there should be no criminal liability for inadvertent negligence, even gross negligence, and some references are given, but the note concludes: "The

Committee does not share the view that gross negligence is insufficient as a ground from criminal liability. Since the Committee does not recommend any change in the law in this respect it does not consider it necessary to elaborate its reasons." This may be rather misleading for the Committee is proposing that henceforth gross negligence should be a sufficient degree of fault whether or not death or, indeed, any harm is caused, and this certainly involves a significant extension of criminal liability. But quite apart from that, it is to be hoped that the Committee's undisclosed reasons are better than that given for not "elaborating" them. If a law reform Committee decides to recommend no change in a rule which many have regarded as controversial, some reasons ought to be given. This barren footnote is the Committee's sole contribution on the place of negligence in the criminal law, and it may be thought to weaken all of this part of the Report.

Whether some form of inadvertent negligence should be sufficient fault for guilt of serious crime has been much debated in recent years. Present orthodoxy has it that, outside the class of quasi-criminal offences, criminal liability for inadvertent negligence is quite exceptional, (see eg *Walker* [1958] NZLR 810 CA; *Mackenzie v Hawkins* [1975] 1 NZLR 165 SC). This position is supported by some commentators, while others have argued for increased liability for negligence, the fundamental issue being whether the criminal law should punish only conscious decisions to risk harm, or should be extended in an attempt to deter inattention, which although less heinous may be just as dangerous (Weiler, "The Supreme Court of Canada and the Doctrines of Mens Rea", (1971) 49 Can B Rev 280, 325).

A number of arguments have been advanced in support of the view that an insistence on advertent recklessness is unsatisfactory, and that gross negligence should suffice for liability, at least for offences against the person. First, it has been argued that whereas one may often be able to draw a genuine inference that an actor really *intended* a particular consequence (eg the inference that D intended to kill V when he plunged a knife into V's back), it will usually be much more difficult to infer that consequences were actually *foreseen* if it is thought that an inference that they were intended cannot safely be drawn. For example, suppose D throws a brick and it strikes V; if there is doubt as to whether D actually intended this result it may well be impossible to be sure that he actually foresaw the possibility – if conduct does not clearly reveal an intention that something should happen it is likely to be quite ambiguous in respect of mere foresight (see, eg Gerald Gordon, "Subjective and Objective Mens Rea" (1975) 17 Crim LQ 335; Landon, Book Review, (1954) 70 LQR 556, 558). In New Zealand it appears to be common practice on charges of murder to direct juries on the alternatives of intentional and reckless killing, but the difficulties in proving true recklessness are such that it may be that it would be better if this was done only in somewhat exceptional cases (cf *La Fontaine v The Queen* (1977) 51 ALJR 145). This first argument is of limited significance, for the mere fact that liability for recklessness will be properly imposed in relatively few cases does not mean that some broader test of fault is necessarily essential. Secondly, it has been suggested that "common sense" tells us that deliberate actions are often performed under strong emotions such as rage or pain, without any actual thought of the consequences, even obvious consequences, then entering the mind. And it has been suggested that (at least in the context of personal violence) the presence or absence of such advertence is of relatively little importance in assessing the moral culpability of the actor, more important factors (which are ignored by existing definitions of offences) being the extent to which the actor had "control over the situation" and whether he acted on impulse or after premeditation (see, eg Cross, "The Mental Element in Crime" (1967) 83 LQR 215, 225; Hadden, "Offences of Violence, The Law and the Facts" [1968] Crim LR 521; Buxton, "Negligence and Constructive Crime" [1969] Crim LR 112, 123; Gordon, op cit, 384).

Against this, it may be doubted whether there are many people who are really unaware of the likely consequences when they act violently towards another (even if foresight of the precise degree of harm may well be absent), and it would be extremely difficult to satisfactorily define offences to take account of the offender's "control over the situation," or the degree of premeditation. Of course, such factors could be taken into account on sentencing, provided the Court is given a discretion at that stage, although that might be thought to be a rather glib answer to the problem unless satisfactory procedures are adopted for dealing with the attendant problems of proof and consistency. Furthermore, it may be thought that the above argument underrates the importance of foresight of consequences in assessing the blameworthiness of conduct (cf *La Fontaine v The Queen* (1977) 51 ALJR 145, 150, per Gibbs J, 158, per Jacobs J). Thirdly, it has been argued that there may be nothing improper in punishing a person even though he never adverted to the relevant harm or risk (provided the individual's personal capacities are

taken into account): outside the criminal law we commonly blame people for negligently but inadvertently causing harm – we regard them as "wrongdoers" – and it is no more unreasonable to suppose that punishment will persuade people to take more care than it is to suppose that it will deter conscious wrongdoing (eg Hart, *Punishment and Responsibility* (1968) Ch 6; Brett, *An Inquiry into Criminal Guilt* (1963), 99-100). Of course, such an argument goes to the fundamental issue of the propriety of holding that "truly criminal" offences may be committed by inadvertent negligence, and this seems to be largely a matter of personal opinion. Those who do not accept the above argument may agree that liability for negligence (gross or otherwise) is quite different from strict liability, and that punishment and the threat thereof might persuade people to take more care, and that in ordinary life we commonly "blame" those who are negligent. But even if all this is conceded it may still be rationally argued that inadvertent negligence should not suffice when serious crime is alleged: everyone occasionally makes negligent mistakes and the odium of conviction and the more severe penalties of the criminal law should be reserved for those who consciously chose to offend (cf Note, "Negligence and the General Problem of Criminal Responsibility", 81 Yale LJ 949 (1972); Glanville Williams, *Criminal Law, The General Part* (2nd ed) p 122).

At this point it might be suggested that the practical difference between recklessness and gross negligence is so slight that there can be little objection to an extension of criminal liability to include the latter. This requires a consideration of just what is involved in a finding of "gross negligence".

The meaning of "gross negligence" – An individual's conduct may be said to have been "negligent" if the circumstances were such that a reasonable man would have foreseen the risk of the relevant harm and would have taken greater care to avoid the harm than was taken by the individual. The test is "objective" in that it depends on what the hypothetical reasonable man would have foreseen and done: an individual is not to be excused because he did not actually foresee the harm in question, or because his personal attributes were such that he would not normally be expected to achieve a higher standard of conduct.

Whenever negligence is made the basis of liability there will be a degree of uncertainty as to how particular cases will be disposed of, for in each particular case the Court or jury must decide what is a "reasonable" degree of skill and care, and what was "reasonably" foreseeable. (For the same reason there may be uncertainty when true "recklessness" is required, but no such "balancing exercise" is needed when liability depends on "intention": J C Smith, "Intention in Criminal Law" (1974) 27 Current Legal Problems, 93). Such uncertainty is necessarily increased when "gross" negligence is required, for whatever terminology is used it is inevitable that the tribunal of fact will be left to decide whether the conduct in each particular case was bad enough to warrant criminal sanctions: it must decide whether the conduct "showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment" (*Bateman* (1925) 19 Cr App Rep 8, 11; The Committee gather a number of judicial descriptions of the required degree of fault, but none of them are any more illuminating: Report, paras 54-59). But while uncertainty in the application of the criterion of "gross negligence" is unavoidable, the concept itself may be, and needs to be, further elucidated.

In proposing that "gross negligence" should be required for criminal liability, the Committee suggests that the English "unlawful act" cases "are too severe in adopting the wholly objective test of what a sober and reasonable person would have realised, for the accused who did not fully appreciate the danger may have done little more than make an understandable error of judgment" (Report, para 53). This watered-down version of the test in *Church* ignores the fact that the Court there spoke of what "*all* sober and reasonable people would *inevitably*" foresee, and "little more than an understandable error of judgment" is a remarkable way of describing the "unlawful act" (ie offence) required in these cases; but of more interest here is the unexplained implication that a test of "gross negligence" is not "wholly objective". To what extent is the requirement of gross negligence not "objective"?

In *Andrews v DPP* [1937] AC 576 Lord Atkin merely insisted that manslaughter required "a very high degree of negligence", and he also said: "I do not myself find the connotations of mens rea helpful in distinguishing between degrees of negligence". This does not suggest a test which is other than "objective": it merely requires the Court to find that the risk was an obvious one and that the accused's conduct fell far below the standard of care which would have been attained by a reasonable man. Lord Atkin also accepted the *Bateman* test, that it should be "conduct deserving punishment", but by itself that seems to be unhelpful on this question. There are, however, at least two ways in which factors peculiar to an individual accused might be held by the Courts to be relevant to the issue

of gross negligence, although it seems that neither of these possibilities has yet been clearly developed.

First, the Courts might require that the personal capacities of the accused be taken into account. In supporting the propriety of imposing criminal liability for negligence, Hart has suggested that such liability should be imposed only if the accused, given his physical and mental capacities, could have attained the standard of conduct of a reasonable man (Hart, *Punishment and Responsibility* (1967), Ch6). It has been said that this is not the present approach of the Courts (Smith and Hogan, *Criminal Law* (3rd ed) 65), but even if this is so when *mere* negligence suffices for liability, it may well be an appropriate approach when "gross" or "criminal" negligence is required. Some support for this may be found in the directions of the trial Judge in *Stone and Dobinson* [1977] 2 WLR 169. In that case the two accused were convicted of manslaughter by gross negligence, the aging and eccentric victim having died after the accused had failed to provide necessary medical treatment and care. Stone was 67, partially deaf, almost totally blind, with no appreciable sense of smell; Dobinson was his mistress, aged 43, and was described as "ineffectual and somewhat inadequate". The trial Judge's directions on gross negligence included the following: "... what did he do about it, and what could he have done .... You do not judge him on what you would have done yourselves; but you take the man as you find him .... So far as Mrs Dobinson is concerned ... did she do her incompetent best? Certainly if she did that, then you would acquit her". The correction of these instructions is open to doubt, for in affirming the convictions of the Court of Appeal suggested that the directions to the jury might have been unduly favourable to the defence, although it did not explain how. But even if Hart's rule is the correct one when gross negligence is alleged, there would be difficulties in administering it. It would often be very difficult to determine the true capacities of an individual, and Hart himself acknowledged that in practice the Court might be able to take account only of "gross" or "clear" incapacities (contrast the vague description of Mrs Dobinson). Even when relevant incapacities can be satisfactorily identified the decision whether the individual "could" have done better may be mere speculation, and it may be thought that Hart's formula does not give sufficient effect to personal capacities: when "gross" deviation from the standards of a reasonable person is required it is probable that it will only be in the most exceptional case that the individual was genuinely *unable* to attain the low standard required. The approach suggested by Hart could, however, be modified to give greater effect to the individual's personal attributes. Instead of asking "could" the accused have attained a higher standard, the test could be: Given that objectively the standard of conduct was low enough to be described as "grossly negligent", *should* this individual be criminally liable for the conduct, having regard to all the circumstances of the case, including the individual's personal attributes? Such a test would, of course, openly leave a moral judgment to the tribunal of fact, but it seems that this is unavoidable whenever liability depends on "gross negligence", or even mere negligence (cf Howard, *Criminal Law* (3rd ed), 370-373). In any event, whatever the precise nature of the test eventually adopted by the Courts, it is submitted that it would be wrong to adopt a test of liability applicable to serious crimes which ignores the personal capacities of the accused.

Secondly, the Courts might assess the accused's conduct in the light of the circumstances actually known to him. Imposition of criminal liability for negligence means that a person may be guilty of an offence even though he did not himself foresee that particular consequences would or could result from his conduct, but it does not necessarily follow that a lack of awareness of circumstances existing at the time he acted, or failed to act, is equally irrelevant. Such a distinction was drawn by Holmes when he expounded his famous doctrine of objective responsibility: Holmes' theory was that a person was liable for consequences which "a man of reasonable prudence would have foreseen" and not merely for "what this very criminal foresaw", but (at least as a general rule) he required that the alleged offender had "knowledge of the present state of things" which made the relevant consequences reasonably foreseeable (Holmes, *The Common Law* (1881), 53, cf JC Smith, "Intention in Criminal Law" (1974) 27 Current Legal Problems, 93; Jacobs, *Criminal Responsibility* (1971), 129-130; *DPP v Smith* [1961] AC 290). It may be objected that Holmes drew this distinction in the course of stating what was essentially a test for determining what an accused foresaw; but in fact Holmes argued that all that was required was that the relevant consequence was reasonably foreseeable, and thus it seems that his criterion of liability was truly one of negligence. Actual knowledge of existing facts seems to be an important factor in the definition of negligence in the Model Penal Code, which requires a gross deviation from the standard of care that a reasonable man would observe in the actor's situation, "considering the nature and purpose of his conduct and the circumstances known to him" (MPC, Prop Official

Draft, s 202 (2)(d). On the other hand, this question seems to have received little attention from the Courts, although reference may again be made to the directions on gross negligence in *Stone and Dobinson* [1977] 2 WLR 169. At one point the jury were there told that the liability of the accused "depends to a large extent on the extent of their knowledge of [the victim's] condition; of their individual appreciation of the need to act .... Mr Stone says 'nothing was done because I was not aware of the gravity of the matter .... I did not know the actual conditions in which my sister was living.' If that is true or if it may be true then you will acquit him". Thus, the trial Judge required actual knowledge of the circumstances which gave rise to the foreseeable danger, but of course the correctness of these directions was left open by the Court of Appeal which went no further than saying that "the defendant must be proved to have been indifferent to an obvious risk of injury to health". (In the context of the Court of Appeal judgment "indifference" seems to have been contrasted with actual foresight of the risk; see J C Smith [1977] Crim LR 166). A similar approach, in a rather different context, is found in *Parker* [1977] 1 WLR 600. The accused had broken a telephone handset by "smashing" it down onto the dialling unit. In affirming his conviction for "recklessly" damaging property the Court of Appeal reasoned that because the accused "knew of the circumstances which surrounded his act" it could not be doubted that he had acted "recklessly", for the risk of damage as a result of his act was "obvious". The Court thought that the accused's state of mind was at least "the equivalent of knowledge" of the risk of damage (and, therefore, truly "reckless"), but it did not require actual advertence to the risk and thus it seems to have imposed liability for negligence – which was doubtless "gross". Whatever may be thought of this decision as an exercise in interpreting the word "reckless" in a criminal statute, it is of general interest in the context of criminal negligence because of the emphasis placed by the Court on the accused's actual knowledge of the circumstances: the necessary fault was proved because the risk was obvious in the circumstances known to the accused. If such actual knowledge is required for a finding of "gross negligence" (or "reckless disregard for the safety" of others), that would be a significant qualification of the objective nature of the test.

Before leaving the meaning of gross negligence it may be noted that the individualisation of the test of negligence is by no means unknown in the law of tort. In tort it is clear that as a general rule the personal attributes of the defendant are ignored in deciding whether his conduct fell below the required standard, and the Court will usually have regard to what ought reasonably have been known and foreseen. In some special cases, however, it has been held that the defendant will be liable only if he had actual knowledge of the physical facts which gave rise to the reasonably foreseeable risk of harm, and only if his conduct fell below what was reasonable for a person of his particular capacities and resources (see *British Railways Board v Herrington* [1972] AC 877 (HL); *Southern Portland Cement Coy v Cooper* [1974] AC 623 (PC); *Goldman v Hargraves* [1967] 1 AC 645 (PC)). In these cases the Judges have concluded that fairness requires a relaxation of the strictly objective standard of care which is normally insisted upon in tort, they being cases where a positive duty has been effectively imposed on the defendant by circumstances for which he is not responsible. But although these cases are thus rather special, they do show that the adoption of "negligence" as a criterion of liability leaves significant scope for the actual knowledge and capacities of an individual to be taken into account. It is submitted that such an approach should be adopted when liability for a serious crime is in issue, and that the requirement that the negligence must be "gross" justifies the Courts adopting such an approach. If negligence is to be enough for criminal liability it is desirable that the concept should be interpreted in a way which maximises the degree of moral fault required. And if an allegation of gross negligence does require a consideration of personal capacities and knowledge in the ways suggested above, the difference between true recklessness and gross negligence would perhaps be of little practical significance.

The proposed irrelevance of harm – The proposal that the new offences would be committed even though no one suffered any actual harm is probably the most radical change recommended in the Report. The Committee has here adopted an argument which was developed some ten years ago by one of the Committee's members, in an article which is not cited in the Report: Patricia Webb, "To Let the Punishment Fit the Crime: A New Look", (1967) 2 NZULR 439. Webb contended for a quite general principle: in deciding whether an offence has been committed, and if so, the gravity of the offence, the law should look only at the conduct of the alleged offender and the degree of fault which is established (be it intention to cause a particular harm, recklessness or negligence); the actual consequences of that conduct should not be relevant to either liability or penalty. Webb reasoned that no legitimate object of punishment justifies taking account of the actual results of conduct, which

in any particular case may depend entirely on luck or chance: the need for and usefulness of reformative measures depends on what a person does and the degree of fault, and it is dangerous and wrongful conduct which must be prevented or deterred. The principle that a penalty should not exceed what is "fair" or "just", in that it should be reasonably proportionate to the gravity of the offence, is best applied by reference only to the dangerousness and blameworthiness of the conduct of the accused, for what actually results may depend entirely on factors which have nothing to do with the culpability of the accused (eg the driver of a car which goes through a red light may miss colliding with another simply because the latter happens to stall, or the person who intends serious injury to another may fail to cause this because the intended victim ducks the blow). At one point Webb seemed to qualify this by suggesting that consequences actually intended could be properly considered in assessing the appropriate punishment (ibid, 448), but it is apparent that this was not really accepted for she subsequently asserted that an attempt which failed for reasons independent of the accused should be regarded as being as serious as a successful attempt (ibid, 452).

The Committee reviewed the existing statutory provisions relating to manslaughter (punishable by a maximum of life imprisonment: s 177), injuring by an unlawful act (maximum penalty of three years: s 190), and criminal nuisance (which requires actual knowledge of the danger to the safety or health of the public or any person, and carries a maximum of one year: s 145). It concluded that the present law is unsatisfactory in that the seriousness of an offence is made to depend on the actual result of the individual's conduct, which result may be quite fortuitous. In particular it was thought to be wrong that a relatively minor unlawful act could lead to guilt of an offence as serious as manslaughter when "the risk of a grave result was not reasonably foreseeable" (Report, para 45; this assumes that the view of the law adopted in the Australian cases of *McCallum* [1969] Tas SR 73, and *Phillips* [1971] ALR 740, 758, does not apply here; contrast *Fleeting (No 1)* [1977] 1 NZLR 343). Also, it was thought to be wrong that a person who has been guilty of grossly negligent conduct should be exonerated from liability to a large extent (if not entirely) simply because, "by a lucky stroke of chance", harm does not actually occur, or the harm which does occur is less than was to be expected. "If there is . . . a significant element of danger in the accused's acts, it is that element of danger that ought to be taken into account in proscribing such conduct and setting a penalty in respect of it. The potential harm rather than the actual harm provides the proper measure of liability" (Report, para 48). Thus, the Committee recommends the creation of offences which will be committed if the accused was grossly negligent and his conduct was likely to cause grievous bodily harm or some lesser injury, even though no harm actually occurred. It also proposes that the present offences of wounding with intent (s 188) and injuring with intent (s 189) should be replaced so that harm ceases to be required, it sufficing that the accused intended his conduct to cause grievous bodily harm, or injury.

The argument that criminal liability should not depend on chance is obviously persuasive, but should it and the Committee's consequential recommendations be accepted? It is submitted that there are four objections to these proposals.

(1) The suggested offences are excessively broad and somewhat uncertain in their scope. They could be committed by acts that are not unlawful independently of the provisions creating the offences, and they appear to be capable of rendering people liable to severe penalties when their conduct may not be generally regarded as truly criminal. This is particularly so if gross negligence is held to be a sufficient degree of fault. Blackstone's well known workman who flings down timber into a street without proper warning or caution would seem to be covered, even if no one is hit, and (perhaps) even if no one happens to be nearby (cf Blackstone, *4 Commentaries*, 192), but more surprising cases can be imagined. Suppose a person in seeking to catch a bus runs down a crowded footpath, dodging in and out of other pedestrians (who may include young children and old people): is that not conduct "likely to cause injury or endanger safety" (if not "likely to cause grievous bodily harm"), and might it not be said that the runner is acting "with reckless disregard for the safety" of others? The same may be true of a person who simply runs round a street corner when he is unable to see if anyone is obstructing his way: even if no one is there the runner could be within the proposed offences. It seems absurd to suggest that such people should be guilty of a serious indictable offence.

(2) A Criminal Code which ignores that which actually results from criminal conduct may be thought to give insufficient weight to public sentiment, or the popular indignation that is aroused by the actual occurrence of harm, but which is largely absent when no harm is done. This is one objection which the Committee confronts. It notes that in his *History of the Criminal Law of England* (1883), Vol III, 311, Stephen has supported the traditional distinction between those whose negligence causes death and those

whose negligence causes no injury, reasoning that:

> "it seems to me that it would be rather pedantic than rational to say that each had committed the same offence, and should be subjected to the same punishment. In one sense each has committed an offence, but the one has had the bad luck to cause a horrible misfortune, and to attract public attention to it, and the other the good fortune to do no harm. Both certainly deserve punishment, but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm, and the effect in the way of preventing a repetition of the offence is much the same as if both were punished."

The Committee pleads modern enlightenment to reject this: "Readers a century later will not accord so high a place to the desire to gratify what Stephen supposed to be a natural public feeling. We find his reasoning unattractive and reject it as a justification of the scheme of criminal liability embodied in the present Act" (Report, para 47).

But is it not true that people generally feel that the law should impose penalties on those whose wrongful conduct in fact causes others harm and suffering, and that this reaction is usually not nearly so strong when no harm is caused? The Committee appears to doubt whether this can be fairly described as a "natural public feeling"; is it suggested that it is unnatural? It may be that when people attach significance to the harm actually done they are reacting in an emotional rather than a rational manner – it may be a reaction of common feeling rather than common sense – but even so we should require very good reasons before we exclude from the criminal law distinctions commonly drawn by ordinary folk. It may be that the Committee was not entirely convinced by its own argument, for an actual killing is required to result before the proposed offence of "unlawful killing" is committed; this would be punishable by up to life imprisonment, but a mere attempt to kill would carry a maximum of 14 years. In other words apart from provocation, the present definition of murder is retained, with a lesser penalty for the attempt. In the light of the Committee's view of the relevance chance should be allowed to have it seems plain that the significance accorded to the fact of death in these provisions is misplaced.

No doubt a commonly felt desire for retribution does not provide sufficient justification for punishing someone in the absence of sufficient fault or mens rea, but its presence or absence may well be a relevant factor affecting the decision whether a reduced penalty should be imposed, or whether criminal sanctions may be dispensed with entirely. It is noteworthy that although in one respect the Committee uses the argument against allowing chance to operate in determining liability in order to relieve people of criminal liability (the "manslaughter by an unlawful act" cases), in other cases the argument is used to *increase* the scope of criminal liability. This leads to the next, and perhaps the most substantial, objection.

(3) It is submitted that there is no apparent need for the expansion of the criminal law proposed by the Committee. Justice, logic and consistency are all desirable in the criminal law, but many would also contend for an additional limiting principle: we should only have as much criminal law as we need to have. This point was made by Professor J C Smith "The Element of Chance in Criminal Liability" [1971] Crim LR 63. Smith drew attention to the extent to which chance may play a role in criminal law, often because some actual harm is required by the definition of an offence, but he did not conclude that there should necessarily be reform to avoid this result in all cases. In particular, he doubted whether the deterrent effect of the law is significantly lessened by granting immunity to, or imposing a lesser punishment on, those whose conduct does not happen to cause harm. Moreover, in the context of manslaughter he noted that there seemed to have been no demand for an offence of negligently causing non-fatal injuries, and concluded that this suggested "rather strongly" that there was no need for such a law (ibid, 74). In New Zealand there is already a crime which can extend to such injuring, carrying a maximum penalty of three years (s 190), but the Committee is not satisfied with this: "We consider that the sanctions at present provided are quite inadequate for grossly negligent conduct that does not happen to result in death" (Report, para 45). Nothing is said in support of this opinion and no reasons are given for supposing that criminal sanctions are needed in respect of grossly negligent conduct which causes no harm at all, and it is submitted that there is no reason to suppose that such a general offence is needed. It is possible that the Committee might say that some such change is required to avoid the injustice which may result from inequality of treatment under the present law: if A and B are guilty of the same kind of wrongful conduct, but A is punished more severely because his conduct happened to cause more harm than B's, it may be said that there is injustice as between A and B, an injustice which should be avoided. Such an argument assumes that the harm actually

caused must be ignored in assessing what is "just", and that is disputable, but even if it is accepted, the argument appears to be weakened by the fact that it is based upon the unobtainable ideal of absolute equality of treatment. Provided that the person who actually causes harm is not subjected to a penalty that is greater than is appropriate for the gravity of the offence, it is submitted that treating another more leniently simply because he caused a lesser harm is not so great a wrong as to require that both be punished equally.

From time to time the Legislature has identified particular activities which have been thought to be so highly dangerous that they should be prohibited independently of the need for any harm: the offences of careless, dangerous and reckless driving are amongst the most obvious examples. It is submitted that this piecemeal approach is to be preferred to the adoption of a general offence of the kind advocated by the Committee. The traditional approach of the Legislature is more likely to result in criminal liability being imposed only when it is really necessary, and it results in much more precisely defined offences.

(4) It is most unlikely that the extended offences would be regularly enforced. As Webb recognised, the absence of harm will often mean that in many cases the offence would never come to light, and in the absence of harm it would often be impossible to prove the required degree of negligence (Webb, op cit, 448-449). To this one may add the suspicion that few people would think it worth while pursuing to prosecution those who have neither caused harm nor deliberately tried to cause harm. We employ traffic officers to perform the necessary task of superintending our driving, but it may be doubted whether the police can be expected to perform a similar function in relation to all manner of other lawful activities.

Conclusions

Others have received the Committee's Report with rather more enthusiasm than the present writer (eg Doyle, [1977] NZ Recent Law 93), and there is no doubt that it contains a number of bold recommendations which have been prompted by an admirable desire that the law should be more logical and flexible.

Although the treatment of provocation in the Report is somewhat superficial, this is cured by the detailed Working Paper appended to the Report. While it is a matter of considerable interest to criminal lawyers, the elimination of the defence of provocation would be of practical importance in a relatively small number of cases; on the other hand, the proposed abolition of the mandatory penalty for murder has a rather wider significance. The Courts may have more difficulty in fixing a "proper" sentence for a deliberate killing (particularly when there was no great provocation) than the Committee recognises, and the method of establishing alleged mitigating factors would become important (thus, for example, the Report asserts that "the culture and upbringing of a Polynesian" may render him more susceptible to provocation than "the ordinary man of Anglo-Saxon origins", but presumably the Courts would not be expected to accept propositions such as this without the assistance of evidence). Also, the imposition of a finite term of imprisonment would mean that the Executive would have rather less control over the length of time actually served than it has when a sentence of life is passed; it remains to be seen whether it will be prepared to accept this. It may also be that the proposed abandonment of the term "murder" will prove a bigger obstacle than it would seem to be to a lawyer.

It seems to this writer that the second part of the Report is open to more objection than the first. It deals with a much wider area – in effect, all serious offences against the person short of murder – but there is no Working Paper to supplement the rather cursory treatment of the law and the issues one finds in the Report. There should be some attempt to justify the insistence that gross negligence should suffice for criminal liability throughout this area of the criminal law, and to explain why the present penalties for such conduct are inadequate (particularly as the Committee *appears* to think that gross negligence suffices for liability under s 188 (2) and s 189 (2), although that is very debatable); and the meaning of "gross negligence" may be in need of a closer examination than is provided by the rather unhelpful judicial utterances quoted in the Report. The abandonment of the requirement of actual harm is inconsistent with the retention of the need for death in the first part of the Report, and is probably premature.

The Government and industry are hooked here on an old basic law-making dilemma which has been thrown back into the limelight by last year's decisions in the courts. Make detailed, clearly understandable, rules and you end up with anomalies, rigidities, hard cases and hence bad law. But leave it to Ministers to say, eg, which prices may rise, and you create confusion, unease and the likelihood that political pressures will make for bad decisions and hence bad law – *The Economist.*